WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.09.2006

Coram :

THE HONOURABLE MR.JUSTICE R.BALASUBRAMANIAN

AND

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) Nos.67 & 68 of 2003
and 920 of 2005

T.C.(A) Nos.67 & 68 of 2003:

Commissioner of Income Tax,
Coimbatore. ..Appellant

Vs

S.Venkatasubramaniam ..Respondent

T.C.(A) No.920 of 2005:

Shri Kamal Kumar V Shah ..Appellant

Vs

Commissioner of Income-tax,
Coimbatore ..Respondent

T.C.(A) Nos.67 & 68 of 2003:

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras, 'A' Bench in I.T.A. Nos.100/Mds/97 and 325/Mds/99 dated 03.01.2003 for the assessment years 1993-94 and 1994-95 respectively against the order of Commissioner of IT (Appeals) dated 4.11.96 and 24.12.98 respectively in ITA.No.179-C/96-97 and 70-C/97-98 respectively.

T.C.(A) No.920 of 2005:

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai, 'D' Bench in I.T.A. No.557/Mds/2000 dated 01.04.2005 for the assessment year 1996-97 against the order of Commissioner of IT (Appeals) X, Chennai-34 dated 28.1.00 made in IT/NT/GT Appeal No.234 C/99-2000.

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

For Appellant in TC(A)
Nos.67 & 68 of 2003 : Mr.T.Ravikumar

For Respondent in TC(A)
Nos.67 & 68 of 2003 : Mr.V.Ramachandran,
Senior Counsel for
M/s.Anitha Sumanth

For Appellant in TC(A)
No.920 of 2005 : Mr.N.Srinivasan

For Respondent in TC(A)
No.920 of 2005 : Mr.T.Ravikumar

JUDGMENT

P.P.S.Janarthana Raja, J.

T.C.(A) Nos.67 & 68 of 2003:

The present appeals in T.C. (A) Nos.67 & 68 of 2003 are filed under Section 260A of the Income Tax Act, 1961 by the Revenue against the order passed in I.T.A. Nos.100/Mds/97 and 325/Mds/99 dated 03.01.2003 by the Income Tax Appellate Tribunal, Madras, 'A' Bench. On 17.10.2003, this Court admitted the appeal and formulated the following question of law.

> "1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the admission fee and contribution to infrastructure development fund paid by the assessee to become a member of the stock exchange is a revenue expenditure?"

2. The facts leading to the above question of law are as under:

i) The assessee is a share-broker. The relevant assessment year are 1993-94 and 1994-95 and the corresponding accounting years ended on 31.03.1993 and 31.03.1994 respectively. For the assessment year 1993-94, the assessee filed Return of income admitting a total income of Rs.1,20,340/-. Later, the assessment was taken up for scrutiny and notice was issued under Section 143(2) of the Income-tax Act (hereinafter referred to as the "Act"). The assessment was completed on a total income of Rs.2,45,344/-. While completing the assessment, the Assessing Officer disallowed the admission fee of Rs.1,25,000/- as payment to Coimbatore Stock Exchange on the ground that the said payment was made only for acquisition of capital asset. Aggrieved by the order, the assessee filed an appeal to the Commissioner of Income-tax (Appeals). The said C.I.T.(A)

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

allowed the appeal by following another assessee's case in the case of Shri D.Balasundaram in ITA No.491-C/95-96 dated 10.11.1995. Aggrieved by the order, the Revenue filed an appeal to the Income-tax Appellate Tribunal (hereinafter referred to as the "Tribunal").

ii) For the assessment year 1994-95, the assessee filed Return of income admitting a total income of Rs.1,49,830/-. The Assessing Officer completed the assessment on a total income of Rs.4,44,061/-. While completing the assessment, the Assessing Officer disallowed the claim of a sum of Rs.1,84,234/- paid to the Coimbatore Stock Exchange as infrastructure development charges. The Assessing Officer was of the view that the amount was paid for acquisition of the capital asset, namely, the Membership Card. Aggrieved by the order, the assessee filed an appeal to the C.I.T.(A). The said C.I.T.(A) allowed the appeal. Aggrieved by the order, the Revenue filed an appeal to the Appellate Tribunal. All the appeals relating to both the assessment years were taken up together and the same was dismissed by the Tribunal by a common order.

3. Learned Standing Counsel appearing for the Revenue submitted that the assessee had incurred expenditure towards payment of admission fees as well as Infrastructure Development Fund paid to the Coimbatore Stock Exchange for the purpose of obtaining the right to trade in share and the benefit derived by the assessee is of enduring nature. Hence the same is only a capital expenditure. The Membership Card is an asset and it gives the benefit of an enduring nature lasting beyond the assessee's closure of business. By making these payments, the assessee has been given the privilege to function within the premises of Coimbatore Stock Exchange. Hence it is only capital in nature. To support the above contention, Revenue relied on the following judgments:

a) 276 ITR 567 (Cal.) in the case of Rajendra Kumar Bachhawat Vs. Commissioner of Income-tax.

b) 272 ITR 138 (Raj.) in the case of Satya Narain Modani Vs. Income-tax Officer and Another.

c) 263 ITR 368 (Raj.) in the case of Ravindra Kumar Jain Vs. Commissioner of Income-tax and Others.

d) 225 ITR 792 (SC) in the case of Punjab State Industrial Development Corporation Ltd. Vs. Commissioner of Income-tax.

4. Learned counsel for the assessee submitted that the admission fee and contribution to Infrastructure Development Fund is only to become a member of the Coimbatore Stock Exchange and the same cannot be treated as capital expenditure due to the fact that there is no acquisition of any asset. The Coimbatore Stock Exchange had sought to provide certain facilities to its members by developing infrastructure facilities for due

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

conduct of the business of the stock broking and hence the amount paid towards Admission fee as well as Infrastructure Development Fund is only allowable as revenue expenditure. He further drew our attention to the respective Articles of the Memorandum of Stock Exchange that the Stock Exchange does not confer any ownership right in the Stock Exchange.

5. Heard the counsel. The assessee has incurred expenditure towards the admission fee of Coimbatore Stock Exchange as well as contribution of development charges. By incurring these expenditure the assessee had acquired right of trading in shares and securities at the terminals of Coimbatore Stock Exchange. To acquire the said Membership Card, the condition precedent is that the assessee shall pay admission fee as well as the contribution to infrastructure facilities, and only after paying the same, the assessee will become entitled to trade at the terminals of the Coimbatore Stock Exchange.

6. The Coimbatore Stock Exchange was incorporated under the Companies Act on the 9th day of July 1991. The main object stated in the Memorandum of Association of Coimbatore Stock Exchange Limited reads as under:

> "iii) OBJECTS:
>
> A. THE MAIN OBJECT TO BE PURSUED BY THE COMPANY HEREINAFTER REFERRED TO AS THE "EXCHANGE" ON ITS INCORPORATION IS
> To apply for and obtain from the Government of India recognition of the Exchange as a recognised Stock Exchange within the meaning of the Securities Contracts (Regulation) Act, 1956 and to facilitate assist, regulate and control the trade and business in all kinds of securities with a view to safeguard and further the interests of brokers, jobbers, dealers and the investing public."

Clause B of the Objects, deals with the objects incidental or ancillary to the attainment of the main objects. Clause C of the Objects, deals with other objects not included in Clauses A and B.

7. The Articles of Association of Coimbatore Stock Exchange Limited, deals with members. Article 3 states that only certain persons shall become the members of the Exchange. Article 4 states that the membership shall constitute a permission from the Exchange to exercise the rights and privileges attached thereto. Articles 9 and 10 of the Articles of Association of Coimbatore Stock Exchange Limited reads as under:

> "9. Every applicant applying for the Membership of the Exchange shall pay an admission fee of Rs.1,00,000/- (Rupees one lakh only) or such higher amount as the Council may fix from time to time. Further, he / it

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

shall also pay such contribution for infrastructure development as the Council may fix from time to time. 25% of the admission fee shall be paid to the Exchange along with the application.

10. (a) Every member shall pay an annual subscription of Rs.2,000/- (Rupees two thousand only) or such other higher amount as may be fixed by the Council from time to time. Such annual subscription prescribed under these presents shall be payable on admission and there after on or before 30th day of April every year for which the subscription is due.

(b) The Council may levy and collect a service charge of 0.1% of the volume of transactions of each member subject to a minimum of Rs.1,000/- (Rupees one thousand only) per month or any higher amount to meet the data processing charges, administrative expenses and the capital expenditure on infrastructure development."

From a reading of the above, it is clear that a member has to pay a sum of Rs.1,00,000/- as well as contribution for Infrastructure Development for becoming a member. Further it is also stated that the member has to pay an annual subscription for Rs.2,000/-. Without making these payments, the assessee cannot become a member. The assessee is a stock-broker, without becoming a member, he cannot carry on the business. It is an admitted fact that the Stock Exchange allowed only their members to carry on business on the floor of the Stock Exchange. As per the Articles cited above, a member cannot carry on business unless he pays the admission fee, contribution to infrastructure development and annual fee. So, payment is necessary for the assessee to carry on the business. By becoming a member, the assessee is also entitled to the benefit of using all the facilities of the Stock Exchange. The assessee is not the owner of any of the assets in the Stock Exchange. It cannot, therefore be said that any enduring benefit had accrued to the assessee. It is also very difficult to say how the amount paid for becoming a member can possibly be regarded as a capital expenditure.

8. In the case of Empire Jute Co. Ltd. Vs. Commissioner of Income-tax, reported in 124 ITR 1, the Supreme Court held as follows:

"The decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is no all embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts, keeping in mind the broad

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

picture of the whole operation in respect of which the expenditure has been incurred. But a few tests formulated by the courts may be referred to as they might help to arrive at a correct decision of the controversy between the parties. One celebrated test is that laid down by Lord Cave L.C. in Atherton v. British Insulated and Helsby Cables Ltd. [1925] 10 TC 155, 192 (HL), where the learned Law Lord stated:

".....when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such as expenditure as properly attributable not to revenue but to capital."

This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd. [1965] 58 ITR 241 (PC), it would be misleading to suppose that in all cases, securing a benefit for the business would be, prima facie, capital expenditure "so long as the benefit is not so transitory as to have no endurance at all". There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. But even if this

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

> test were applied in the present case, it does not yield a conclusion in favour of the revenue. Here, by purchase of loom hours no new asset has been created. There is no addition to or expansion of the profit-making apparatus of the assessee. The income-earning machine remains what it was prior to the purchase of loom hours. The assessee is merely enabled to operate the profit making structure for a longer number of hours. And this advantage is clearly not of an enduring nature. It is limited in its duration to six months and, moreover, the additional working hours per week transferred to the assessee have to be utilised during the week and cannot be carried forward to the next week. It is, therefore, not possible to say that any advantage of enduring benefit in the capital field was acquired by the assessee in purchasing loom hours and the test of enduring benefit cannot help the revenue."

In the above judgment, the Supreme Court held that test of enduring benefit is, therefore, not a certain or conclusive test and the same cannot be applied blindly and mechanically without regard to the facts and circumstances of a given case. In the present case, no new assets had been created and there is no addition to or expansion of the profit-making apparatus of the assessee. Payment of admission fee as well as contribution to infrastructure development is like nature of license fee and it is paid only for carrying on the business. If any payment is made for the purpose of running the business effectively and efficiently, it is only a revenue expenditure. By becoming a member, the assessee is permitted to make use of the facility provided in the Stock Exchange and hence it is only revenue expenditure. It is seen from the record that there is no dispute by the Revenue in respect of the annual fee paid by the assessee to the Coimbatore Stock Exchange.

9. In the case of Alembic Chemical Works Co. Ltd. Vs. Commissioner of Income-tax, Gujarat reported in 177 ITR 377, the Supreme Court held as follows:

> "The idea of "once for all" payment and "enduring benefit" are not to be treated as something akin to statutory conditions; nor are the notions of "capital" or "revenue" a judicial fetish. What is capital expenditure and what is revenue are not eternal verities but must needs be flexible so as to respond to the changing economic realities of business. The expression "asset or advantage of an enduring nature" was evolved to emphasise the element of a sufficient degree of durability appropriate to the context.

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

> There is also no single definitive criterion which, by itself, is determinative whether a particular outlay is capital or revenue. The "once for all" payment test is also inconclusive. What is relevant is the purpose of the outlay and its intended object and effect, considered in a common-sense way having regard to the business realities. In a given case, the test of "enduring benefit" might break down."

Applying the abovesaid principle, we can safely conclude that the amounts paid by the assessee to the Stock Exchange by becoming a member, is only revenue expenditure.

10. Learned counsel for the Revenue strongly placed reliance on the Supreme Court Judgment reported in 225 ITR 792 in the case of Punjab State Industrial Development Corporation Ltd. Vs. Commissioner of Income-tax, wherein it was held as follows:

> "We do not consider it necessary to examine all the decisions in extenso because we are of the opinion that the fee paid to the Registrar for expansion of the capital base of the company was directly related to the capital expenditure incurred by the company and although incidentally that would certainly help in the business of the company and may also help in profit-making, it still retains the character of a capital expenditure since the expenditure was directly related to the expansion of the capital base of the company. We are, therefore, of the opinion that the view taken by the different High Courts in favour of the Revenue in this behalf is the preferable view as compared to the view based on the decision of the Madras High Court in Kisenchand Chellaram's case [1981] 130 ITR 385. We, therefore, answer the question raised for our determination in the affirmative, i.e., in favour of the Revenue and against the assessee."

In the above Supreme Court judgment, the assessee paid fees to the Registrar of the Company for expansion of the share capital. The issue involved in the Supreme Court judgment is whether the amount paid is a capital or revenue expenditure in computing the income of the assessee. The Supreme Court held that the said expenditure related to the share capital of the company and hence it is only a capital expenditure. So, the facts of the Supreme Court are different from the facts involved in the present case. Hence the Supreme Court judgment has no relevance to the present case.

11. Learned counsel for the Revenue further relied on Calcutta High Court judgment reported in 276 ITR 567 in the case of Rajendra Kumar

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

Bachhawat Vs. Commissioner of Income-tax. In that case, the assessee paid a sum of Rs.25,00,000/- for development charges for the purpose of becoming a member of the Calcutta Stock Exchange. In that judgment, we find that there are no discussions or details available. Hence, with great respect, we are not agreeing with the same.

12. Learned counsel for the Revenue further relied on the Rajasthan High Court judgment reported in 272 ITR 138 in the case of Satya Narain Modani Vs. Income-tax Officer and Another, and also the judgment reported in 263 ITR 368 (Raj.) in the case of Ravindra Kumar Jain Vs. Commissioner of Income-tax and Others. In the above cases, the issue involved is whether the membership of the stock exchange is a property and on its transfer whether capital gains tax is attracted or not. The another issue is that, when the assessee has transferred the membership card at a lower value than its market value, the difference should be taxed as gift-tax under Gift-tax Act or not. In both the judgments, the issue is entirely different from the present case. Hence, these judgments have also no relevance.

13. In view of the foregoing reasons, we are of the view that the Tribunal is right in holding that amount paid towards admission fee as well as contribution to infrastructure development is revenue expenditure and in view of the same, we answer the questions of law in favour of the assessee and against the Revenue. Hence the tax cases are dismissed. No costs.

T.C.(A) No.920 of 2005:

14. This appeal is filed under Section 260A of the Income Tax Act, 1961 by the assessee against the order passed in I.T.A. No.557/Mds/2000 dated 01.04.2005 by the Income Tax Appellate Tribunal, Chennai, 'D' Bench. On 26.10.2005, this Court admitted the appeal and formulated the following questions of law.

> "1. Whether the Income-tax Appellate Tribunal was right in law in holding that the payments made to Coimbatore Stock Exchange towards infrastructure Development Fund of Rs.3,32,166/- and towards Guarantee Fund of Rs.25,000/- were capital expenditure?
>
> 2. Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in following the decision of a Chandigarh Bench of the Tribunal (88 ITD 496) in preference to the decision of the Single Member Bench of the Chennai Tribunal wherein identical issues of another member of the same stock exchange were decided in favour of the appellant of that case?"

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

15. In respect of Question No.1, we answer the question in favour of the assessee, against the Revenue by following the Tax Case (A) Nos.67 and 68 of 2003, as discussed above. In view of answering the Question No.1, the second question becomes academic and does not require our consideration.

16. In view of the above observation, the tax case filed by the assessee is allowed. No costs.

km

Sd/-
Asst. Registrar

//true copy//

Sub Asst.Registrar

To

1.The Income Tax Appellate Tribunal, 'A' Bench, Chennai.
2.The Income Tax Appellate Tribunal, 'D' Bench, Chennai.
3.The Commissioner of Income Tax (Appeals), Coimbatore.
4.The Commissioner of Income Tax (Appeals) X, Chennai.
5.The Commissioner of Income Tax, Coimbatore.

+ 2 Ccs to Mr.N.Muralikumaran, Advocate Sr.Nos.45740 & 45741.
+ 1 Cc to M/s.Anita Sumanth, Advocate Sr.No.45425.

KSJ (CO)
RSM/12.10.2006

T.C.(A) Nos.67 & 68 of 2003 and
920 of 2005

https://hcservices.ecourts.gov.in/hcservices/